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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NICHOLAS FRANCIES, Plaintiff and Appellant, v. WILLIAM KAPLA, Defendant and Appellant.	A102260, A103738 (City & County of San Francisco Super. Ct. No. 990271)

Defendant Dr. William Kapla appeals from the judgment entered in favor of his former patient, plaintiff Nicholas Francies, on his complaint for medical malpractice, invasion of privacy, and violation of the Confidentiality of Medical Information Act, Civil Code section 56 et seq. (CMIA) based on the allegation that without Francies's consent, Kapla disclosed Francies's HIV status to Francies's employer. Kapla contends the trial court erred by, among other things, permitting Francies to proceed on theories other than professional negligence; rejecting Kapla's claims of judicial estoppel and litigation privilege; and entering judgment in Francies's favor contrary to the weight of the evidence. Francies has filed a cross-appeal challenging the trial court's calculation of damages.

In the unpublished portion of this opinion, we reject Kapla's asserted errors with regard to the causes of action for medical malpractice and violation of the CMIA, but conclude the judgment is unsupported with regard to the cause of action for invasion of privacy. In the published portion of the opinion, we conclude the trial court erred in the manner in which it applied Code of Civil Procedure section 877, Civil Code section

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part I of the Discussion.

1431.1 (Proposition 51), and Civil Code section 3333.2 (the Medical Injury Compensation Reform Act, or MICRA) to the calculation of recoverable damages.

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 1997, Francies filed a complaint against Kapla alleging that Kapla had disclosed his HIV status to his employer without his consent, resulting in Francies's termination from his employment and causing him to suffer severe physical, mental and emotional distress. The complaint, as amended in January 1999, asserts liability under causes of action for medical malpractice, for constitutional, intentional and negligent invasion of privacy and for a violation of the CMIA. Both parties waived their right to a jury trial and the case was tried to the court. The following evidence was presented at trial.

Francies was diagnosed as HIV positive shortly after Kapla became his primary care physician in 1993. In 1995, Francies began working as the general manager of the Savoy Brasserie restaurant in San Francisco. By the summer of 1996, Francies was having difficulties at work with his supervisor and with other employees. His supervisor was intruding into his personal life. He had been accused of harassment by two employees and of drug and alcohol use at work by another employee. He was having trouble completing a budget projection that was due on October 31, 1996. As a result of the pressure in his personal and professional life, Francies became so anxious that he developed insomnia and a rash.

On October 31, rather than reporting to work to submit the budget projection, he went to see Kapla. He told Kapla that he was too anxious to work, and Kapla agreed. Kapla requested that his assistant, Janet Blair, fax a note to the restaurant certifying that Francies was temporarily disabled and would be out of work for one month. Francies completed the workers' compensation forms necessary to obtain benefits for the month and Kapla filled out the required form entitled "Doctor's First Report of Occupational Injury or Illness" (first report or report). Kapla checked a box indicating Francies was suffering from an additional condition that might impede or delay his recovery, and

added the notation that "[patient] is managing HIV disease." Francies was unaware that his HIV status was included in the report.

On November 11, Blair faxed a number of workers' compensation forms, including the first report, to the restaurant. The parties offered different explanations as to why Blair faxed the report to Francies's employer, rather than to its insurer as she should have done. Blair testified that although she did not remember Francies asking her to fax the report to his employer, he must have done so because in the ordinary course of business she would not have done so unless asked. Francies expressly denied asking her to fax the report to his employer. Kapla testified that although he continued to treat Francies for two months after the disclosure and knew that Francies was upset that his employer had learned of his HIV status, Kapla did not know that the report had been faxed to the restaurant until after Francies filed this lawsuit.

The day after the restaurant received the report, Francies's supervisor and the restaurant owner agreed that Francies's HIV disease could pose a "PR nightmare" and that Francies would have to be discharged. On December 19, Francies was notified by mail that he had been replaced as general manager and would thereafter be considered an "employee on unpaid leave without benefits."

Francies filed a wrongful termination action against the restaurant, which he eventually settled for $160,000. He also recovered $43,035 in workers' compensation benefits.

After a bench trial in the present action, the court issued a statement of decision finding in favor of Francies on his causes of action for medical malpractice, constitutional invasion of privacy and violation of the CMIA.[1] The trial court rejected Kapla's defenses of judicial estoppel and litigation privilege. It found that Francies had not consented to the disclosure of his HIV status to his employer and that the disclosure constituted

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[1] The trial court found against Francies on his causes of action for intentional and negligent invasion of privacy. The court questioned whether a cause of action for negligent invasion of privacy existed, but ultimately rejected both claims on the ground that there was no public disclosure of the private information.

medical malpractice, an invasion of privacy and the unlawful disclosure of medical information. The court found that Francies had suffered $70,000 in economic damages and $425,000 in noneconomic damages. After reducing the damages to reflect an allocation of fault, prior recoveries, and the limitation imposed by MICRA, in a manner explained more fully below, recoverable damages were reduced to $191,998.96. Francies was also awarded $1,000 in attorney fees under the CMIA.[2] Following the entry of judgment both Francies and Kapla filed timely notices of appeal. The appeals have been consolidated for all purposes.

DISCUSSION

I. Kapla's Appeal (A102260)*

Kapla challenges the judgment in Francies's favor on numerous grounds. We reject his arguments with respect to the causes of action for negligence and violation of the CMIA but find merit in one of his arguments concerning the claim for invasion of privacy.

1. *The trial court did not abuse its discretion by rejecting Kapla's claim of judicial estoppel*.

Initially, Kapla contends that Francies should be judicially estopped from arguing that his former employer first learned of his HIV status by reading the report faxed by Kapla's office on November 11, 1996. Kapla relies on the fact that in the prior wrongful termination action Francies presented evidence that his employer learned of his HIV status on November 8, three days prior to the fax transmission. The doctrine of judicial estoppel may be invoked when "(1) the same party has taken two positions; (2) the

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[2] Civil Code section 56.35 provides for damages under the CMIA as follows, "In addition to any other remedies available at law, a patient whose medical information has been used or disclosed in violation of Section 56.10 or 56.104 or 56.20 or subdivision (a) of Section 56.26 and who has sustained economic loss or personal injury therefrom may recover compensatory damages, punitive damages not to exceed three thousand dollars ($3,000), attorneys' fees not to exceed one thousand dollars ($1,000), and the costs of litigation."

* Part I of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) " ' " 'The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. [Citation.] "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.' " [Citation.] Judicial estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.' " [Citation.] Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion . . . .' " ' " (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1245.)[3]

The trial court rejected the application of judicial estoppel, finding that the prior inconsistent position had not been adopted by the court in the prior action and that the

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[3] Kapla contends we should review the trial court's ruling on his defense of judicial estoppel *de novo*. His reliance on *Crocker Nat'l Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888, is misplaced. In *Crocker*, the court held that a trial court's classification of an item as a fixture must be reviewed independently as the classification "involves the application of the rule to the facts and the consequent determination whether the rule is satisfied. And the question is predominantly legal: the pertinent inquiry bears on the various policy considerations implicated in the solution of the problem of taxability, and therefore requires a critical consideration, in a factual context, of legal principles and their underlying values." In contrast, the application of judicial estoppel requires a critical consideration, in a factual context, of equitable principles firmly grounded in the trial court's discretion. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., supra*, 106 Cal.App.4th at p. 1245.) To the extent Kapla requests *de novo* review of the denial of his motion for summary judgment based on this defense, we agree with the trial court's ruling that a triable issue of fact existed, at a minimum, as to whether Lane's prior statement was an honest mistake.

inconsistent evidence had been submitted as the result of an honest mistake. Kapla points out correctly that there are circumstances in which courts have applied judicial estoppel even though the prior statement was not adopted by the court in the earlier action. (See *Thomas v. Gordon* (2000) 85 Cal.App.4th 113; *Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th 171, 183-184, fn. 8.) It is not necessary to determine whether this is such a circumstance, however, since substantial evidence supports the trial court's finding that the prior statement was the product of an honest mistake.

Francies's assertion in the wrongful termination action that his employer learned of his HIV status on November 8 was based on a declaration of David Lane, in which Lane explained that he had been hired to replace Francies and on November 8, 1996, was instructed to fire Francies because of his HIV status. His declaration states that "on November 8, 1996, my first day of employment, I attended a staff meeting at the Savoy Hotel. . . . After the staff meeting, (on the same day), I participated in a private meeting with Leah McCann [Francies's supervisor] and Francois Shih [the restaurant owner]. In this meeting, Leah McCann, in the presence of Francois Shih, told me that the restaurant manager of the Brasserie Savoy Restaurant, Nicholas Francies, was gay and HIV-positive." Lane explained at the trial in the present action that he was mistaken about the date of the meeting, and that after reviewing documents that were not available to him at the time of the original statement, he realized that the meeting to which he referred had taken place on November 12. Lane's testimony was entirely plausible. We see no basis to conclude that the trial court abused its discretion by permitting Francies to argue that his employer first learned of his HIV status by reading the report faxed from Kapla's office on November 11.

2. *Francies's claims are not barred by the litigation privilege*.

Kapla contends Francies is precluded from asserting a cause of action based on the first report because the report is a privileged communication under Civil Code section 47, subdivision (b). The absolute privilege of Civil Code section 47, subdivision (b), "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the

litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The third and fourth factors provide a limit to the scope of the privilege in that the communication must " 'be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action.' . . . [T]he statement [must] have some 'reasonable relevancy to the subject matter of the action.' " (*Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 148, *Silberg*, *supra*, at p. 220.) Kapla argues that communications made in relation to a workers' compensation action, which is a quasi-judicial proceeding, are protected by the privilege. He relies on *Harris v. King* (1998) 60 Cal.App.4th 1185, 1187-1188, in which the court held that a plaintiff's claim for defamation against his treating physician based on statements contained in a medical report filed with plaintiff's workers' compensation carrier was barred by the litigation privilege. (*Ibid*.) The injury complained of in this case, however, did not arise from the submission of the first report to the workers' compensation carrier, but from the disclosure of the report to Francies's employer. This disclosure was not required to process Francies's claim for workers' compensation benefits.[4] Accordingly, there is no connection between the disclosure and the workers' compensation proceedings that would justify application of the litigation privilege. (See *Bradley v. Hartford Acc. & Indem. Co*. (1973) 30 Cal.App.3d 818, 827, disapproved on different grounds in *Silberg v. Anderson*, *supra*, 50 Cal.3d at pp. 216-219 ["fact that a . . . statement was initially protected by an absolute privilege because it was uttered on a privileged occasion by persons who are covered by the privilege does not include a full

[4] In his reply brief Kapla states, "pursuant to Labor Code section 5400, if Francies had failed to notify the Savoy of his claimed injuries, *i.e.* if Dr. Kapla had failed to transmit the First Report to the employer, Francies's workers' compensation claim would have failed for lack of proper notification." Kapla goes on to state that "administrative bodies deem the First Report to constitute notice upon an employer." While Kapla may be correct that an employee can provide the necessary notice to his employer by delivering a copy of the first report, nothing in Labor Code section 5400 requires that notice be given in this manner. Section 5400 requires only that the employee serve "upon the employer notice in writing, signed by the person injured or someone in his behalf."

scale, blanket authorization to republish the same on a nonprivileged occasion to persons to whom the privilege is not applicable"].)

Moreover, even if the privilege were applicable, Civil Code section 47 does not provide "blanket immunity for disclosures . . . of constitutionally protected privileged communications." (*Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847 (*Cutter*).) Francies has an undeniable constitutionally protected interest in the privacy of his medical records, and his " 'right to privacy outweighs the policies underlying the judicial proceedings immunity when private material is voluntarily published, without resort to a prior judicial determination.' " (*Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141 [plaintiff's claim for invasion of privacy for disclosing HIV status to employer, against doctor who examined him in connection with workers' compensation proceeding, is not barred by litigation privilege]; see also *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345, 353.)

In *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303, footnote 1, the court questioned the continued viability of the balancing-of-interests test set forth in *Cutter v. Brownbridge*, *supra*, 183 Cal.App.3d 836, in light of the California Supreme Court's description of the litigation privilege in *Silberg v. Anderson*, *supra*, 50 Cal.3d 205, 215, as "absolute [in] nature." However, more recent authority has concluded that the balancing of a plaintiff's constitutional right to privacy against the policy concerns underlying the litigation privilege is both appropriate and required by controlling California Supreme Court authority. (See *Jeffrey H. v. Imai, Tadlock & Keeney*, *supra*, 85 Cal.App.4th at pp. 355-361 [discussing continued viability of *Cutter* after *Silberg*]; see also *Heller v. Norcal Mutual, Ins. Co.* (1994) 8 Cal.4th 30, 42, citing *Urbaniak v. Newton*, *supra*, 226 Cal.App.3d 1128 with approval; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26, 27, fn. 7, citing *Urbaniak* with approval [interests must inevitably be weighed in the balance against competing interests before the right is judicially recognized].)

3. *Substantial evidence supports the court's finding that Kapla was liable for medical malpractice*.

To establish a cause of action for professional negligence, the plaintiff must establish: (1) the existence of a duty; (2) breach of that duty; (3) causation; and (4) actual loss or damage. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.) "The standard of care in a medical malpractice case requires that medical service providers exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of their profession under similar circumstances. The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.) Here, the trial court found that Kapla breached the applicable standard of care by "not obtaining written consent for the disclosure of plaintiff's HIV status."[5] The court found further that Francies did not consent to the disclosure of his HIV status to his employer, and that Francies did not ask Blair to fax the first report to his employer. Kapla contends there is no substantial evidence to support these findings.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with

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[5] The court alternatively found that Kapla was negligent based on his violation of Health and Safety Code section 120980. Section 120980 assesses a civil penalty against "[a]ny person who negligently discloses results of an HIV test, as defined in section 120775, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply." Kapla challenges the court's finding that the disclosure violated section 120980 on a number of grounds, including that Kapla was not given adequate notice of the alleged violation because Francies did not plead the violation as a separate cause of action, Dr. Richwald's testimony regarding the interpretation of section 120980 was improper expert testimony, and section 120980 applies only to the disclosure of the actual test results and not to the fact that the patient is HIV positive. Because we uphold the judgment based on the alternate finding that the disclosure violated the applicable standard of care, we need not address Kapla's arguments with respect to section 120980.

the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics in original.)

The testimony of the expert witnesses called by both Francies and Kapla establishes that the standard of care was breached by Kapla's disclosure of Francies's HIV status without his consent. Francies's expert, Dr. Gary Richwald, testified that disclosing a patient's HIV status to his employer and coworkers without the patient's consent violates the standard of care.[6] He explained that "it is part of just standard medical privacy, even if this wasn't HIV, that these kinds of issues should be discussed between the physician and the patient." Dr. Richwald later added that although he did not believe that Francies's HIV status should have been noted on the first report, if Kapla thought the notation was proper he should have discussed it with Francies so that Francies could make an informed decision about its disclosure. Even Kapla's expert, Dr. Lowell Young, agreed that "Kapla would have violated the standard of care in 1996 if he unilaterally sent [Francies's] doctor's first report to his employer without his knowledge or consent."[7] Dr. Young reiterated on a number of occasions that his opinion that Kapla's conduct did not violate the standard of care was premised on the assumption that

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[6] On appeal, Kapla challenges Dr. Richwald's qualifications as an expert on the grounds that he does not practice medicine in San Francisco and has not treated an HIV patient in ten years. Despite Kapla's citation to the reporter's transcript, it does not appear that Kapla objected to Dr. Richwald's qualifications as an expert in the trial court. To the extent that Kapla objected to Dr. Richwald's testimony on other grounds, his objections were specifically withdrawn. Accordingly, Kapla waived any challenge to Dr. Richwald's qualifications.

[7] Later, Dr. Young again agreed that the "standard of care would have required that Mr. Francies, 1, be aware of the information that is going to be disclosed and; 2, have an opportunity to say 'I do or don't want it disclosed.' "

Francies authorized Kapla to send the first report to his employer. The trial court, however, rejected the factual predicate for this assumption.

Contrary to Kapla's argument, substantial evidence supports the trial court's finding that Francies did not request that the first report be sent to his employer. The statement of decision reads, "Defendant asserts that plaintiff impliedly consented to the disclosure of his HIV status based on defendant's theory that plaintiff himself gave Blair the first report prepared by Kapla along with a packet of other forms that he brought to the office November 11, 1996, telling Blair to fax these documents including the first report to [his employer]. However, there is no evidence to support this theory. Blair's testimony in this regard was based on speculation. Blair admitted she had no actual recollection of any such event. [¶] In addition, plaintiff testified that he did not have the report and did not give it to Blair." On appeal, Kapla reiterates his theory as to why the first report was faxed. The fact remains, however, that Blair testified she did not remember why she faxed the report. While Kapla contends she would have done so only if asked by Francies, it is also possible that she did so by mistake. In any event, the trial court found that Francies did not ask Blair to fax the report and that finding is amply supported by Francies's testimony. We are bound to uphold the trial court's finding.

Likewise, Francies did not impliedly consent to the disclosure of his HIV status by instituting workers' compensation proceedings. Kapla argues that when Francies commenced those proceedings, his employer had the legal right to view all of his medical records. *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 441, cited by Kapla, actually defeats Kapla's argument. In *Pettus*, the court held that an employee's expectation of privacy in his medical information was not diminished by his request for paid leave under his employer's disability policy. The court reasoned, "It is true, as a general matter, that Pettus put his mental condition in issue by requesting paid leave under Du Pont's disability policy. It is also true that Du Pont had a right to know whether Pettus was in fact disabled by stress and, perhaps, whether or not his disability was work related, before it was bound to provide Pettus with paid disability leave. But the detailed psychiatric information Du Pont requested and obtained from Drs. Cole and Unger, and ultimately

used to make adverse personnel decisions about Pettus, was *far more* than the employer needed to accomplish its legitimate objectives. [Fn. omitted.] It also exceeded the scope of disclosure to which Pettus may be deemed to have consented either expressly or impliedly when he requested disability leave, submitted to psychiatric evaluation, and orally acknowledged that Dr. Cole would be reporting back to Du Pont." (*Id*. at p. 442.) Likewise, in the present case, Francies's employer may have been entitled to the information included in the workers' compensation report that Francies's recovery might be impeded by other nonwork-related health concerns. The disclosure of his HIV status, however, was not necessary to provide his employer with this information. "It would have been possible to mention the patient's concern over his health as a source of stress without specifically mentioning his HIV positive status." (*Urbaniak v. Newton*, *supra*, 226 Cal.App.3d at p.1141.) Accordingly, Francies's consent to the disclosure of his HIV status cannot be implied from the filing of his claim for workers' compensation.[8]

Substantial evidence also supports the trial court's finding that Francies suffered severe emotional distress and was terminated from his job because of the disclosure of his HIV status. Francies testified that he had difficulty sleeping and experienced panic attacks as a result of the disclosure. Additional witnesses, including his treating

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[8] In addition, there are sound public policy reasons for rejecting Kapla's legal consent argument. In *Jeffrey H. v. Imai, Tadlock & Keeney, supra,* 85 Cal.App.4th at page 355, the court concluded that the disclosure of a patient's HIV status was actionable because the disclosure affected " 'the core value' protected by California Constitution, article I, section 1, informational privacy." The court recognized that "the unauthorized disclosure of HIV-positive test results undermines the 'public interest' in encouraging patients to submit to HIV testing and to make needed disclosures of HIV-positive status during medical treatment." (*Ibid*.) The court reasoned that "the pleadings here suggest the disclosure of private information in a manner tending to compromise appellant's right of access to the courts. The price of access to the courts or an arbitration forum should not include the risk of disclosures of embarrassing personal information having no connection with the dispute at issue." (*Ibid*.) The same policy considerations militate against a finding of implied consent in the present case. An employee should not risk disclosure of his HIV status by seeking to recover workers' compensation benefits unrelated to his HIV disease.

psychologist, confirmed that the disclosure had caused Francies to become "very upset," "extremely nervous," "extremely traumatized" and "extremely agitated." David Lane testified he was instructed to terminate Francies because he was HIV positive. The testimony of Francies's employer that Francies was discharged because of poor performance and Kapla's testimony that Francies suffered only a minor depression that did not preclude his return to work demonstrates no more than a conflict in the evidence. The trial court rejected this evidence, finding that the disclosure of Francies's HIV status "caused plaintiff significant mental distress, and it aggravated his preexisting condition of acute, severe situational stress reaction. Plaintiff manifested new and serious symptoms including agoraphobia, and was disabled from returning to work for two years . . . ." The testimony offered by Francies's witnesses amply supports the trial court's findings.

Finally, contrary to Kapla's argument, Francies provided sufficient evidence of actual loss resulting from the disclosure. Kapla contends that between his settlement with his employers and the workers' compensation benefits, Francies has been fully compensated for his "mild depression," and that he cannot recover any additional lost wages because he indicated in prior proceedings that he was ready and able to return to work. The evidence discussed above, however, supports the trial court's finding that the unauthorized disclosure of Francies's HIV status had a "devastating impact," causing more than a mild depression, and justifies the award of noneconomic damages. Any risk of double recovery was eliminated by deducting from the damages awarded an appropriate allocation of the prior recoveries in the wrongful termination and workers' compensation proceedings. (The proper method of allocation is addressed in connection with Francies's cross-appeal, *post*.)

Kapla's reliance on Francies's statement in a letter to his employer that he was prepared to return to work on January 15, 1997, is also misplaced. Francies testified he wrote the letter because Kapla told him to write the letter. Francies stated "that we both knew that I wasn't going to be returning, given the information my employer had, but that I should make a good faith effort to write a letter saying that I would be reporting to work on the 15th, I believe a day before, to the employer." Francies believed that it was

necessary to "at least write them and tell them that [I would] return so that [I was] not in the wrong." Once again the trial court resolved the factual dispute in favor of Francies. The court's finding that Francies was not ready to return to work on January 15, 1997 is supported by Francies's testimony and by the additional testimony regarding the depth of his depression discussed above. Accordingly, we affirm the trial court's determination that Kapla committed professional negligence by disclosing Francies's HIV status without his consent.

4. *Francies's additional causes of action are not precluded by his cause of action for medical malpractice.*

Kapla contends the trial court erred by allowing Francies to prosecute his claims for invasion of privacy and violation of the CMIA. He argues, "If a physician is accused of any wrongdoing which 'stems from' or is 'based upon' his or her care and treatment, the appropriateness of his or her conduct can only be measured by professional negligence standards and the Medical Injury Compensation Reform Act (MICRA) principles." This contention was rejected in *Waters v. Bourhis* (1985) 40 Cal.3d 424, 436 [there is nothing "in the legislative history of MICRA which suggests that the Legislature intended either to require a plaintiff to make an election between two viable theories of recovery—one MICRA and one non-MICRA—or to prohibit such a plaintiff from joining MICRA and non-MICRA causes of action in a single proceeding"].)

5. *The trial court erred by entering judgment in favor of Francies on his cause of action for constitutional invasion of privacy.*

Francies's second cause of action asserts a claim for constitutional invasion of privacy. In *Pettus v. Cole*, *supra,* 49 Cal.App.4th 402, the court first recognized a cause of action for constitutional invasion of privacy in the context of an improper disclosure of medical information. The court held that plaintiff has the burden of establishing a legally protected privacy interest in his medical history; a reasonable expectation of privacy in the information; and that the disclosure constituted a serious interference with plaintiff's privacy rights. (*Id*. at pp. 440-443.) More recently, in *Jeffrey H. v. Imai, Tadlock & Keeney*, *supra*, 85 Cal.App.4th at page 353, the court reiterated that " '[t]here can be no doubt that disclosure of HIV positive status may under appropriate circumstances be

entitled to protection under [the right to privacy found in the California Constitution].'" Kapla contends Francies did not meet his burden of proof because "(1) neither Dr. Kapla nor Janet Blair intentionally disclosed that Francies was HIV-positive; (2) there was no egregious breach of social norms; (3) there was no public disclosure of private facts; (4) Francies consented to the disclosure; and (5) Francies did not have a reasonable expectation of privacy." Because Kapla's first argument has merit, we need not address his remaining contentions.

A claim for invasion of privacy requires evidence of intentional conduct. (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 421 (*Marich*);[9] see also *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 50 [elements of claim for invasion of constitutional right of privacy include conduct by defendant constituting a serious invasion of privacy].) In *Marich*, the court adopted the definition of intent found in the Restatement Second of Torts: " 'The word "intent" is used throughout the Restatement . . . to denote that the actor desires to cause consequences of his act, *or* that he believes that the consequences are substantially certain to result from it.' (Rest.2d Torts, § 8A, italics added.) Thus, '[i]ntent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.' (Rest.2d Torts, § 8A, com. b.)" (*Marich*, *supra*, at p. 422.)

Kapla contends that as a matter of law the evidence does not support this cause of action because he did not intentionally disclose Francies's HIV status to Francies's employer. The relevant facts are undisputed. While Kapla intentionally noted Francies's HIV status on the first report, he was unaware that the report had been faxed to Francies's employer until after the fact. He had no reason to suspect that the report would be faxed

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[9] Although *Marich*, *supra*, 113 Cal.App.4th 415 addressed only statutory and common-law claims for invasion of privacy, we see no reason why the same should not be true for a constitutionally based claim of invasion of privacy. Both parties agree that the constitutional cause of action includes the element of intent.

to Francies's employer in the normal course of business. Blair was unaware that the report was included in the forms she faxed to Francies's employer or that the report contained information regarding Francies's HIV status. Indeed, in his opening trial brief, Francies conceded that Blair did not intentionally disclose the information, but urged that the disclosure was negligent. The trial court concluded that "defendant himself committed an intentional act by writing plaintiff's HIV status on the First Report, necessarily disclosing plaintiff's HIV status without first obtaining plaintiff's consent. It is clear that defendant intentionally disclosed plaintiff's HIV status on the First Report and that Blair then sent that form to plaintiff's employer . . . ." Contrary to Francies's suggestion implicitly accepted by the trial court, the inclusion of the HIV notation on the report is not an actionable disclosure. Although the constitutional cause of action does not require the "public disclosure" of private facts, "some kind of overt disclosure is inherent in the concept of invasion of privacy." (*Urbaniak v. Newton*, *supra*, 226 Cal.App.3d at p. 1138, fn. 4.) Francies has not alleged any harm resulting directly from the inclusion of the HIV notation on the report or from the disclosure of the information to the workers' compensation carrier. The harm on which the cause of action is based arises solely from the disclosure of the medical information to Francies's employer. Yet, there is simply no basis to infer that Kapla intended, or even suspected, that Francies's employer would learn of his HIV status when he made the notation in the report. While the evidence supports a finding that Kapla's conduct was negligent in permitting this information to reach Francies's employer, it does not support a finding that he intentionally caused this to happen. Accordingly, the judgment in Francies's favor on this cause of action must be reversed.

6. *The exceptions to liability under the Confidentiality of Medical Information Act are not applicable*.

Civil Code section 56.10, subdivision (a) provides, "No provider of health care, health care service plan, or contractor shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization, except as provided in subdivision (b) or

(c)." As recognized by the California Supreme Court, "the statutory provisions require a health care provider to hold confidential a patient's medical information unless the information falls under one of several exceptions to the act." (*Heller v. Norcal Mutual Ins. Co., supra*, 8 Cal.4th at p. 38.) Kapla contends the trial court erred by failing to apply the exceptions in subdivisions (b) and (c), as well as an exemption he asserts is found in section 56.30, subdivision (h). We address each of these provisions in turn.

Subdivision (b)(7) of Civil Code section 56.10 permits disclosure by a healthcare provider "if the disclosure is compelled by . . . the patient or the patient's representative . . . ." The trial court rejected Kapla's contention that Francies requested the disclosure and, as discussed above, substantial evidence supports that finding. Accordingly, this exception is not applicable.

Subdivision (c)(2) of Civil Code section 56.10 permits a health care provider to disclose medical information "to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, contractor, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made." There is no suggestion that Blair faxed the report to the restaurant to obtain payment for Kapla's services. Even Kapla's theory of why Blair faxed the report does not support the application of this exception. Kapla contends Francies asked that all of his records be faxed to his employer to prevent his employer from firing him, not to obtain payment of his medical bills.

Finally, Civil Code section 56.30, subdivision (h) exempts "[i]nformation and records sought as part of an investigation of an on-the-job accident or illness pursuant to Division 5 (commencing with Section 6300) of the Labor Code or pursuant to section 105200 of the Health and Safety Code" from the disclosure and use limitations of the CMIA. As discussed above, however, Francies's HIV status was not an essential element of the workers' compensation claim, so that the disclosure of that information was not protected by this exception. Hence, the trial court properly entered judgment in favor of Francies on this cause of action.

II. Francies's Appeal (A103738)

Francies appeals from the trial court's award of $25,332 in economic damages and $166,667 in noneconomic damages. The award was calculated as follows. The trial court initially determined that Francies had suffered $70,000 in economic damages and $425,000 in noneconomic damages. These findings are not disputed. The economic damages were reduced by 22 percent of $203,035, or $44,668, to reflect the portion of the recoveries from Francies's employer in the wrongful termination action ($160,000) and from the workers' compensation proceedings ($43,035) attributable to economic damages. Twenty-two percent was derived as the ratio of the $70,000 economic damages to the total award after reducing noneconomic damages to the $250,000 cap imposed by MICRA ($70,000 / $70,000 + $250,000 = 22%). The noneconomic damages were reduced to $250,000 under MICRA and again reduced by $83,333 to reflect the trial court's allocation of one third of responsibility for Francies's damages to Francies's employer. Francies challenges the reduction of both the economic and noneconomic damages.

Francies's initial argument regarding the inapplicability of the MICRA cap to the cause of action for invasion of privacy is moot, as we have concluded that the judgment on that cause of action must be reversed.[10] Kapla points out correctly that Francies did not raise his other arguments concerning the calculation of recoverable damages in the trial court. Francies acknowledges this failure but nonetheless requests this court to review the asserted errors because the new arguments involve pure questions of law that

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[10] Francies, for good reason, does not suggest that the MICRA cap is inapplicable to his recovery under the CMIA. The CMIA prohibits a health care provider from disclosing medical information regarding a patient without prior authorization. (Civ. Code, § 56.10.) Because Kapla's violation of CMIA is based on Kapla's professional negligence, the MICRA cap on noneconomic damages applies to Francies's recovery under this cause of action. However, since the damages awarded by the trial court applied to both the negligence and CMIA causes of action, the recovery under the CMIA does not affect the calculation of recoverable damages. The $1,000 in attorney fees awarded under the CMIA does not apply against the MICRA cap on noneconomic damages.

turn on undisputed facts. We agree that Francies's additional contentions assert purely legal errors that are readily correctable on appeal, and the issues have been addressed on their merits in the briefs of both parties. Accordingly, we exercise our discretion to consider these arguments despite the failure to have raised them below. (*People v. Smith* (2001) 24 Cal.4th 849, 852-853.)

Francies asserts the trial court erred in the calculation of recoverable economic damages. Pursuant to Code of Civil Procedure section 877, the trial court deducted 22 percent of the $203,035 Francies recovered in the prior proceedings from the award of economic damages.[11] The court calculated the percentage based on what it found to be the ratio between Francies's economic damages and the total award. (*Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 841; *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268.) However, in determining this ratio, the court first reduced the amount of noneconomic damages from $425,000 to the $250,000 maximum recovery permitted by MICRA. Francies contends the trial court should have calculated the ratio before, rather than after, applying the MICRA cap to the noneconomic damages. We agree.

The objective of this calculation is to determine the proper allocation between economic and noneconomic damages of the amounts previously recovered. (*Greathouse v. Amcord, Inc.*, *supra*, 35 Cal.App.4th at p. 841; *Espinoza v. Machonga*, *supra*, 9 Cal.App.4th at p. 277.) The MICRA cap had no effect on the amounts recovered either from Francies's employer or as workers' compensation benefits. In using the allocation of damages made by the trier of fact in the current proceedings as the appropriate allocation of the amounts previously recovered, the relevant ratio is the actual economic damages as a percentage of the total damages suffered by Francies, not the ratio between the economic damages and the amount of damages that Francies can recover from Kapla.

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[11] Code of Civil Procedure section 877 provides that a release given in good faith before verdict or judgment "to one or more of a number of tortfeasors claimed to be liable for the same tort . . . [¶] (a) . . . shall reduce the claims against the others in the amount stipulated by the release . . . or in the amount of the consideration paid for it whichever is the greater."

(See *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277-1278 [MICRA cap was intended to limit the *recovery* of noneconomic damages rather than limit the damages the plaintiff actually suffers]; *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1393 [same]; see *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 641.) Accordingly, the prior recoveries should have been allocated based on the ratio between the economic and noneconomic components of Francies's total damages before taking into account any limitation on recovery imposed by MICRA. The proportion of the prior recoveries allocable to economic damages therefore is the ratio between $70,000 and Francies's total damages of $495,000 ($70,000 + $425,000), approximately 14 percent. The trial court should have subtracted only $28,425 (14% of $203,035) from the $70,000 economic damages to offset for the prior recovery of economic damages. The award of economic damages therefore should be increased to $41,575.

With respect to the noneconomic damages, the trial court determined that Kapla was two-thirds responsible for Francies's injury and that Francies's employer was one third responsible. Accordingly, the trial court applied Proposition 51 to award Francies only two-thirds of the $250,000 in noneconomic damages recoverable under MICRA. Francies contends the trial court again erred in applying the MICRA cap before reducing the noneconomic damages to account for the share of responsibility attributable to Francies's employer. We have found no published authority that is precisely on point, but the reasoning of several cases addressing the integration of these various damage limitations demonstrates the merit of Francies's position.

In *McAdory v. Rogers*, *supra*, 215 Cal.App.3d 1273, the court held that the amount of plaintiff's recoverable damages should be reduced to reflect the plaintiff's comparative fault before application of the MICRA cap. If the defendant is responsible for more than $250,000 of noneconomic damages the cap applies, but there is no justification for reducing the recovery below the $250,000 limit. The court reasoned that subtracting the amount of damages attributable to the plaintiff's comparative fault before application of the MICRA cap was consistent with "the primary goal of the comparative fault system, [which] is to '[maximize . . .] recovery to the injured party for the amount of his injury to

the extent fault of others has contributed to it.' " (*Id*. at p. 1279.) Since the plaintiff's total noneconomic damages in that case were $370,000 and the plaintiff was found to have been 22 percent at fault, "[t]here is no legitimate or logical reason for reducing that award to the $250,000 cap prescribed by section 3333.2 *before* reducing it further due to [plaintiff's] 22 percent comparative fault." (*McAdory v. Rogers*, *supra*, at p. 1281.) In *Atkins v. Strayhorn*, *supra*, 223 Cal.App.3d at pages 1391-1393, the court came to the same conclusion based upon the same reasoning.[12] And similar reasoning was adopted in *Salgado v. County of Los Angeles*, *supra*, 19 Cal.4th at pages 640-641, in holding that damages should be reduced to present value before rather than after applying the MICRA cap on noneconomic damages.

The same analysis applies here. The only difference between the situation in the present case and that in *McAdory* and *Atkins* is that Kapla's share of the fault must be reduced to reflect the responsibility of a third party rather than of the plaintiff himself. The MICRA cap limits the amount of noneconomic damages for which Kapla may be held responsible to $250,000, but if he is responsible for noneconomic damages in that amount (or more), MICRA provides no justification for reducing the damages for which he may be held liable below that amount because a third party to whom MICRA does not apply was also partially at fault.

Kapla argues that a contrary conclusion is required by *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 126-130 (*Gilman*), a case decided after the adoption of Proposition 51. There, the plaintiff incurred noneconomic damages in excess of $250,000 as the result of the negligence of two health care providers. The court rejected the argument that "in cases implicating both statutory schemes [MICRA and

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[12] Both *McAdory v. Rogers, supra,* 215 Cal.App.3d at page 1277, and *Atkins v. Strayhorn, supra,* 223 Cal.App.3d at page 1393, footnote 6, rejected *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162 as convincing authority to the contrary. Kapla cites *Semsch* as authority for his position but we agree with the other courts that this issue was not fully considered in the footnote in *Semsch* on which Kapla relies and that that case is not persuasive on this issue.

Proposition 51], the court should first deduct from the jury's verdict the percentage of fault attributable to the other joint or concurrent tortfeasors and then, if the result is still in excess of $250,000, reduce it to the MICRA cap." (*Gilman*, *supra*, at p. 128.) The court reasoned that because a plaintiff cannot recover more than $250,000 in noneconomic damages from all health care providers for one injury,[13] that amount should be apportioned based on the relative fault of the health care providers. *Gilman* thus turns on the fact that the third party who shared responsibility for the plaintiff's injury was also a health care provider, making it necessary, in effect, to apportion the $250,000 MICRA limit. In the present case, however, Kapla is the only responsible party subject to the MICRA cap and MICRA provides no reason to reduce his liability for noneconomic damages below that cap.

This distinction is made unmistakably clear by a hypothetical discussed in footnote 10 of the *Gilman* opinion: "Yet another hypothetical will illustrate the interplay between MICRA, Proposition 51, and comparative negligence principles as implicated in *McAdory v. Rogers*, *supra*, 215 Cal.App.3d 1273. If a jury awards plaintiff $1 million . . . in noneconomic damages and apportions fault as follows—25 percent to plaintiff; 25 percent to a drug company (not a health care provider under MICRA); 40 percent to Dr. A; and 10 percent to Dr. B—then the judgment would be calculated as follows: First, plaintiff's negligence will reduce the $1 million verdict to $750,000 (*ibid.*); the drug company will be severally liable for 25 percent of the verdict, or $250,000; the health care providers' total liability will be $250,000 pursuant to MICRA; this amount will be apportioned 80 percent to Dr. A and 20 percent to Dr. B according to their respective

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[13] The court's reasoning was based squarely on the premise that "[u]nder MICRA, where more than one health care provider jointly contributes to a single injury, the maximum a plaintiff may recover for noneconomic damages is $250,000," citing *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200-201. (*Gilman, supra*, 231 Cal.App.3d at p. 128.) Francies questions whether this proposition is in fact supported by *Yates v. Pollock*, but he cites no authority supporting the view that a separate $250,000 limit applies to each health care provider who contributes to a single injury. It is unnecessary to address that question here.

percentage of fault. If any of the concurrent tortfeasors is insolvent, the liability of the other tortfeasors remains unchanged." (*Gilman*, *supra*, 231 Cal.App.3d at p. 129, fn. 10.) The hypothetical reflects there is no basis to reduce Kapla's liability because of the fault of another party who is not a health care provider, and that since he is the only responsible party to whom MICRA applies, he may be liable for up to $250,000 in noneconomic damages.

In the present case, Kapla was found responsible for two thirds of Francies's noneconomic damages of $425,000, or some $283,000. Since this amount exceeds the MICRA limit of $250,000, his liability for these damages should have been capped at $250,000. There was no basis, however, to further reduce his liability for noneconomic damages.

DISPOSITION

The judgment in favor of Francies on the cause of action for invasion of privacy is reversed. The economic damages on the remaining causes of action should be increased to $41,575 and the noneconomic damages should be increased to $250,000. Hence, the judgment shall be modified to award Francies total damages of $291,575. The judgment is affirmed in all other respects. Francies shall recover his costs on appeal.

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Pollak, J.

We concur:

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Corrigan, Acting P. J.

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Parrilli, J.

Trial court:	City and County of San Francisco, No. 990271
Trial judge:	Honorable Anne Bouliane
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